84-1441

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MAR 20 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1984

ROGER J. KAY, D.O.
Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA
Appellee

MOTION TO DISMISS/AFFIRM

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25 pp

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STATEMENT OF THE CASE

Appellant, Roger Kay, an osteopathic physician, has challenged his sentence arising from his guilty plea to a charge of Criminal Solicitation to Commit Murder in the Court of Common Pleas of Erie County, Pennsylvania. Kay was sentenced to serve a term of four to ten years in a state institution by Erie County President Judge James B. Dwyer following

lengthy pre-sentencing court proceedings.

The record reveals that Kay was the subject of extensive Federal electronic surveillance by the FBI which was investigating his alleged role as the Pennsylvania dispenser of stolen x-ray film and equipment from several southern states. This surveillance placed Kay in a conspiracy involving the interstate transportation of stolen property with Federal charges lodged against Kay in Mobile, Alabama.

Up until October of 1981, Kay was employed as chief radiologist at an Erie hospital. During the month of October, 1981, Kay had allegedly solicited the "contract killing" of another physician at the hospital. Kay was arrested by Federal agents on October 30, 1981 and gave a full confession revealing his role in the conspiracy and solicitation. His confession was not challenged in the lower court. It was incorporated into the record as hearing Exhibit No. 5 in the plea withdrawal hearing before Judge Dwyer on March 21, 1983.

Both FBI surveillance and Kay's own confession following arrest revealed the essence of the criminal solicitation charge against him. The record reveals that FBI agents confronted Kay with the fact that they were aware of his role in securing a "contract killing" arrangement with one "Tony Magliano" for the death of Dr. Daniel Carneval. Kay was also advised that he had been the subject of electronic surveillance and that "Magliano," with whom he had been dealing in person and by phone, was in reality an undercover agent, Wayne Manis.

Kay admitted that he and another associate at the hospital had made arrangements to have Carneval killed. Kay also admitted arranging Magliano's arrival in the City of Erie on October 20, 1981, at which time Kay drove him to Carneval's residence where pictures of the home were taken. Kay also admitted leading Magliano to the hospital and pointing out Dr. Carneval's office as well as h s parking place. Kay admitted meeting with Magliano at the hospital on the following day and paying him $2,000 in cash,

purportedly as an advance on travel expenses for the contract amount. Kay admitted that the additional $8,000 in cash was to be paid after the killing was completed. Finally, Kay admitted that he pointed out Dr. Carneval to Magliano in the doctor's lounge at the hospital.

As previously related, several of the personal contacts and phone conversations between Kay and "Magliano" (Agent Manis) were the subject of electronic surveillance and interception. The last phone conversation between the parties, intercepted by the FBI, was an attempt by Kay to move up the date of the killing in order to save the job of his associate at the hospital.

Following his arrest on the federal charges from Alabama, Erie County authorities charged Kay with Conspiracy and Solicitation to Commit Murder, the subject of the instant appeal.

The federal surveillance was not challenged in either federal or state court. Kay entered a plea of guilty to the federal charges and was sentenced on

August 16, 1982 to serve a term of six years in a federal penitentiary.

Following a preliminary hearing on the state charges, Kay's case was first listed for trial in Erie County Court in March of 1982. The matter was continued at that time by Kay's counsel, Leonard G. Ambrose, III, Esq., citing the need for additional preparation time. The case was next scheduled for trial during the May, 1982 Term of Criminal Court but Kay entered a guilty plea to the Solicitation charge on May 3, 1982 before the Honorable Jess S. Jiuliante. Sentencing was deferred until September 3, 1982 so that the federal sentence could be first imposed.

Since Kay has subsequently challenged the voluntariness of this guilty plea, the "record adequacy" of the plea is of critical importance. Pursuant to authorized Pennsylvania procedure (See Pa.R.Crim.P. 319, 42 Pa.C.S.A.), Assistant District Attorney Frank Scutella questioned Kay as to his awareness of his "rights."

The relevant portions of the plea colloquy which

purport to elicit Kay's understanding of the charges and the factual basis for the plea include the following:

> "MR. SCUTELLA: Your Honor, this is the case of the Commonwealth versus Roger Kay. At No. 1800 of 1981, Mr. Kay is charged with Criminal Solicitation to Commit Murder and Criminal Conspiracy to Commit Murder. Your Honor, by virtue of Section 906 of the Pennsylvania Crimes Code, Roger Kay cannot be prosecuted on both charges, and we are proceeding on the Criminal Solicitation which is Count One.
>
> Do you understand what you are charged with?
>
> MR. KAY: Yes.
>
> MR. SCUTELLA: Do you, also, understand that by pleading guilty, you are admitting to having committed all the acts complained of which constitute the crime of Criminal Solicitation to Commit Murder?
>
> MR. KAY: Yes.
>
> MR. SCUTELLA: Do you understand you have the right to a trial by jury if you plead not guilty?
>
> MR. KAY: Yes.
>
> ...
>
> MR. SCUTELLA: Mr. Kay, you are charged that on October 9th through the 28th, in 1981, that with the intent of promoting or facilitating the commission of the crime of murder, you did command, encourage, or request another person to engage in specific conduct which would constitute that crime or an attempt to commit

that crime or which would establish your complicity in its commission or attempted commission in that you did engage Agent Wayne F. Manis, Special Agent, Federal Bureau of Investigation to kill Dr. Daniel C. Carneval on October 31, 1981, for the sum of $10,000; thereby, you committed the crime of Criminal Solicitation. Do you understand the factual situation here?

MR. KAY: Yes.

MR. SCUTELLA: Can you explain to the Court exactly what happened?

MR. AMBROSE: Your Honor, if the Court please, the defendant agrees that the factual basis for the plea is as Mr. Scutella stated.

MR. SCUTELLA: Is that correct?

MR. KAY: Yes.

MR. SCUTELLA: Do you understand the definition of criminal solicitation?

MR. KAY: Yes.

MR. SCUTELLA: Any questions?

MR. KAY: No.

MR. SCUTELLA: You hired an agent of the FBI to commit the crime of murder?

MR. KAY: Yes.

MR. SCUTELLA: And in fact you gave that agent $2,000 to do that?

MR. KAY: Yes.

(Hearing Exhibit 6; N.T. 2,3,4,5,6)
(Emphasis Added).

Other portions of the plea colloquy in question, not here repeated, gave Kay the opportunity to ask any question of the Assistant District Attorney, his own attorney or the Court. Mr. Kay asked no questions. N.T. 6, 7.

In addition, following the established practice in Erie County, Pennsylvania, Kay also signed a statement entitled " Defendant's Statement of Understanding of Rights," which also addressed his rights in the plea proceeding. See plea withdrawal hearing Exhibit 2.

On the scheduled sentencing date, September 3, 1982, the parties met with Judge Jiuliante and it was agreed that the sentencing would be continued for 120 days so that the psychological tests completed for the federal pre-sentence investigation report could be supplied to Judge Jiuliante and so that a substantial amount of local, pre-sentencing publicity could subside. Kay was sentenced to a 6 year term in August as previously specified.

Attorney Ambrose filed a sentencing memorandum requesting that the Erie County sentence be imposed concurrently with the federal term or involve consecutive probation. A motion seeking recusal of Judge Jiuliante was also filed.

In subsequent court testimony, Judge Jiuliante admitted that his likely sentence was discussed in Chambers between the parties on September 3, 1982, and that he had declared his posture to be "to the effect that it would not be concurrent..." Plea Withdrawal Hearing, N.T. 100-101.

While the recusal petition remained pending before Judge Jiuliante, the sentence in the case was tentatively scheduled for February 25, 1983. Kay had surrendered himself to federal authorities and had commenced his sentence at Milan, Michigan. The attorney-client relationship apparently began to deteriorate when Kay chose to ignore Attorney Ambrose's advice by refusing to sign rendition papers for his return to Erie County Court for the February 25th sentencing. Attorney Ambrose, in later court testimony following

his withdrawal from the case, admitted that he had communicated Judge Jiuliante's sentencing posture to Kay and that "Dr. Kay would not call and would not answer any correspondence we sent to him..." N.T. 90.

On the date scheduled for sentencing, Attorney Ambrose appeared on behalf of the defendant though Kay himself had chosen not to return to Erie County and was not present. When the Commonwealth asserted that it had learned that Kay was apparently making arrangements for other counsel to represent him, Attorney Ambrose indicated that he had not been so informed and chose to proceed on the petition to recuse Judge Jiuliante. See Record of Petition to Recuse Sentencing Judge, February 25, 1983, N.T. 5.

Erie County President Judge James B. Dwyer heard arguments from counsel and ruled that the "appearance of impropriety" would be removed by Judge Jiuliante's recusal from the case. Sentencing was then scheduled before Judge Dwyer for March 21, 1983 and the Commonwealth was directed to force Kay's return and to notify two attorneys in Pittsburgh (present appellate

counsel) to be present for the sentencing.

Three days prior to the sentencing, on March 18, 1983, Kay's present counsel filed an appearance on his behalf as well as a Petition to Withdraw the Guilty Plea; also filed were omnibus pre-trial motions asking for a change of venue/venire, suppression of evidence, etc.

Judge Dwyer heard lengthy testimony on March 21, 1983 as to the withdrawal of the guilty plea (see Record of pre-sentence motion to withdraw guilty plea, N.T. 1-130). The request to withdraw the plea was denied since Kay had cited no fair and just reason and since the Commonwealth would face substantial prejudice if the plea were withdrawn.

Testimony at the hearing included that of Kay, his former attorney, Judge Giuliante, and the prosecuting attorney. Kay was thereafter sentenced to serve a term of four to ten years to run consecutive to the federal sentence. Post-sentencing motions were denied and appeals within the Pennsylvania system were then perfected.

Following the submission of briefs and oral argument, the Pennsylvania Superior Court denied relief in an Opinion issued July 20, 1984. As to the validity of the plea, the Court's review of the plea record "...convinces us that the record completely refutes Appellant's allegations." Pennsylvania Superior Court Opinion, p. 3. Other claims for relief were likewise summarily denied.

Significantly, no federal challenge to Pa.R.Crim.P. 319 or 320 was made in either motion to withdraw the guilty plea or in subsequent appeals to the Pennsylvania Superior and Pennsylvania Supreme Courts.

The Pennsylvania Supreme Court denied further review in a per curiam order issued November 20, 1984. Appellant now proceeds on direct appeal to the United States Supreme Court, setting forth five grounds for relief, all of which are raised now for the first time.

COUNT ONE: MOTION TO DISMISS : The instant appeal does not present a substantial federal question:

While Petitioner attempts to invoke 28 U.S.C. 1257 (2), he has stated that he "...drew into question the

validity of certain Pennsylvania statutes on the ground that they are repugnant to the constitution or laws of the United States, and the state court decision is in favor of their validity." Jurisdictional Statement, p. 2.

In point of fact, neither Pa.R.Crim.P. 319 nor the factual colloquy conducted in the instant case present any significant federal question.

Pa.R.Crim.P. 319 (a), in relevant part, provides that a judge shall not accept a guilty plea "...unless he determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record..." Simply stated, this rule purports to follow the mandate of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed2d 274 (1969), and its progeny.

The rule, in its Comment, mandates inquiry into six specific areas and permits the judge to delegate the actual examination of the defendant to either defense counsel or the attorney for the Commonwealth.

Pa.R.Crim.P. 320 and 321 regulate withdrawal of guilty pleas in Pennsylvania and follow a settled body of law. Pennsylvania caselaw in fact requires a "fair and just reason" for the withdrawal request when the Commonwealth has not been substantially prejudiced. See, inter alia, Com. v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973); Com. v. Anthony, ___Pa.___, 475 A.2d 1303 (1984); U.S. v. Crowley, 529 F.2d 1066 (3rd Cir. 1976), Cert.Den., 425 U.S. 95, 96 S.Ct. 2209, 48 L.Ed2d 820 (1976).

Given the factual findings made by the trial judge and affirmed by both of Pennsylvania's Appellate Courts, no significant federal question is in fact presented. The plea colloquy in question and Kay's real notice of the true nature of the charge as contained therein meets full compliance with Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed2d 108 (1976), and Com. v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974).

Since the lack of a substantial federal question is a matter of record, the Commonwealth respectfully submits that the instant appeal should therefore be

dismissed. Duncan v. Tennessee, 405 U. S. 127, 92 S.Ct. 785, 31 L.Ed2d 86 (1972); Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed2d 262 (1970).

COUNT TWO: MOTION TO DISMISS: Questions presented here have not been timely or properly raised in the trial court or in Pennsylvania's appellate courts and have therefore not been expressly passed on.

Despite Petitioner's present allegations, close review of both Petitions to Withdraw Guilty Plea as well as the appeal to the Pennsylvania Superior Court and the Petition for Allowance of Appeal to the Pennsylvania Supreme Court will establish that any federal constitutional challenge to Pa.R.Crim.P. 319, 320 and 321 has never been made in the instant case.

As Your Court held in Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed2d 392 (1981), "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system (citations omitted)." 451 U.S. 493 at 497-498.

This rationale is most persuasive and should be dispositive of the appeal in this case. The sum total of Kay's posture throughout this matter has alleged an "involuntary" plea of guilty, an implicit assertion of innocence to permit withdrawal of the plea and the ineffectiveness of trial counsel. No challenge to any of the Pennsylvania Rules has ever been made until the filing of the Jurisdictional Statement with Your Court.

While Appellee has no question that the Pennsylvania Rules would pass constitutional muster, neither the Pennsylavnia Superior Court nor the Pennsylvania Supreme Court has had the opportunity to examine these arguments. It is therefore respectfully submitted that the instant appeal should be dismissed.

COUNT THREE: MOTION TO DISMISS: The judgment of the trial court as affirmed by both the Pennsylvania Superior and Supreme Courts rests on an adequate non-federal basis.

The trial court, after hearing testimony from Kay, his former attorney, the plea judge and the prosecuting attorney, denied Kay's last-minute request to withdraw his guilty plea in the following manner:

"Well, the Court is fully aware that the presentence withdrawal request must be liberally construed but I'm also aware the defendant must present a fair and just reason for withdrawing the plea and in this case, I honestly don't see a fair and just reason. And the reason I say that is, considering the actual words in the colloquy given on May 3rd, 1982, it seems to me those questions are very clear, from the testimony of the doctor himself today, as well as from the pre-sentence report there is no question. From the psychiatrists' and psychologists' reports there is no question Dr. Kay is an intelligent person, much more so than the average defendant in a criminal case as Judge Jiuliante says. There is no doubt in my mind he understood everything that went on. I feel he does not have a fair or just reason for withdrawing the plea and in addition to this, I don't think there is any doubt there would be serious consequences to any delay in the trial of this case in that the Commonwealth could be very prejudiced.

You have got the problem of the victim and his family, their feelings which we have to consider, the fact that some of these witnesses may or may not be available, the fact that it happened seventeen months ago and it would be another six months or a year and as time passes, memories diminish. And another thing that impresses me greatly is the fact we have not had an inference or a statement that this defendant is not guilty. He's not denied anything here at all.

So, for those reasons, I'm going to refuse to withdraw the guilty plea as rendered on May 3rd, 1982." Record of Presentence Motion to Withdraw Guilty Plea, N.T. 128,129 (Emphasis Added).

In review of these findings, the Pennsylvania Superior Court Opinion noted that only four arguments were presented for review. The trial court's findings were specifically affirmed with the appellate court noting that "...the record completely refutes Appellant's allegations," and that the proceeding "more than adequately met the requirements of Pa.R.Crim.P. 319." Pennsylvania Superior Court Opinion, p. 3.

The Superior Court also noted that "Nothing in the record indicates the Appellant entered his guilty plea unknowingly or involuntarily." Ibid. These factual findings can be affirmal thereof indicate that the judgment rests on an adequate non-federal basis as to the validity of the plea in question.

The Superior Court noted that the challenge to the prosecutor's conduct of the colloquy was "without merit," since this procedure was expressly authorized by both Pa.R.Crim.P. 319 and Com. v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974). Id. at pp. 3,4.

The Superior Court also noted that Kay "... has never, not even implicitly, asserted his innocence," concluding that "no fair and just reason why he should be allowed to withdraw his guilty plea" was made. Ibid. These conclusions, as a matter of record, amount to a simple affirmation of the trial court's factual findings, a matter totally outside the scope of federal jurisdiction.

In addressing the third claim for review, that of ineffective assistance, the Superior Court noted that trial counsel's decision that a suppression motion would not be successful had "a clear basis in law." Id. at p.6. Moreover, Your Court's most recent pronouncement in Strickland v. Washington, 466 U.S. , 104 S.Ct. 2052, 80 L.Ed2d 674 (1984), does little to help petitioner's cause. There, a record showing would require that circumstances dictate "an attorney's performance fell below an objective standard of reasonableness and so prejudiced the defendant as to result in the denial of a fair trial. This degree of prejudice requires a demonstration

of the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Here, the testimony of the attorney in question (plea withdrawal hearing, N.T. 68-97) included his opinion as to the likely success of any suppression motion and the assessment that "It would be totally without merit." N.T. 96. This opinion was expressly affirmed by the Pennsylvania Superior Court and indeed has an adequate basis in law.

Finally, the fourth issue raised on appeal addressed the sentencing procedures and the rationale of the lower court for imposing a consecutive jail sentence. The Pennsylvania Superior Court noted that this argument was "...totally without merit." Pennsylvania Superior Court Opinion, p. 7. Again, review of this Opinion indicates the clear lack of any federally-based challenge and clear basis for judgment outside the scope of federal review. It is therefore respectfully suggested that the instant appeal should be dismissed.

COUNT FOUR: MOTION TO AFFIRM: It is manifest that the questions here presented for review are so unsubstantial as not to need further argument.

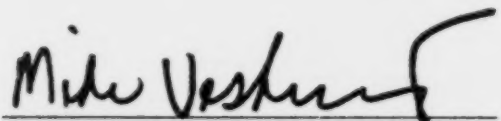
The lack of merit of the issues now presented is best viewed in noting that the Pennsylvania Supreme Court denied review in a simple per curiam order denying the Petition for Allowance of Appeal. That decision notes no need for a brief on the merits of these issues or on any further oral argument. This type of review is of course a matter of sound judicial discretion and notes that an appeal will be allowed "only when there are special and important reasons therefore." Pa.R.A.P. 1114.

The Commonwealth respectfully asserts the obvious by noting that the Pennsylvania Supreme Court has acted summarily and that no better comment as to the merits of these issues need be made.

WHEREFORE, the Commonwealth of Pennsylvania, Appellee in the instant matter, respectfully submits that the appeal in the instant case should be dismissed since it does not present a substantial federal

question; that the questions now sought to be reviewed were not timely or properly raised below and have therefore not been expressly passed on; and that the judgment rests on an adequate non-federal basis; in the alternative, the Commonwealth respectfully asserts that the judgments of the Pennsylvania Superior Court and Pennsylvania Supreme Court should be affirmed since the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,



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